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**ACCESS TO PROPERTY NEAR FERNALD, OHIO
FOR INFORMATION GATHERING UNDER THE
COMPREHENSIVE ENVIRONMENTAL
RESPONSE, COMPENSATION, AND LIABILITY
ACT, AS AMENDED**

07/03/90

**DOE-1403-90
DOE-FMPC/USEPA
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LETTER
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Department of Energy

FMPC Site Office
P.O. Box 398705
Cincinnati, Ohio 45239-8705
(513) 738-6319

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July 3, 1990
DOE-1403-90

Ms. Catherine A. McCord, Remedial Project Manager
U. S. Environmental Protection Agency
Region V - 5HR-12
230 South Dearborn Street
Chicago, IL 60604

Dear Ms. McCord:

**ACCESS TO PROPERTY NEAR FERNALD, OHIO FOR INFORMATION GATHERING
UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND
LIABILITY ACT, AS AMENDED**

- References: 1) Letter, Catherine A. McCord, Remedial
Project Manager, U. S. EPA to Bobby J. Davis,
U. S. DOE, dated May 22, 1990
- 2) Letter, Catherine A. McCord, Remedial
Project Manager, U. S. EPA to Bobby J. Davis,
U. S. DOE, dated June 20, 1990

This is in response to your letter of June 20, 1990 informing the U. S. Department of Energy (DOE) that it has violated the property access provision of the Consent Agreement under Section 120 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended, 42 U. S. C. § 9620. The stated basis for the alleged violation is DOE's "inability to get voluntary access within the time frames allowed by the Consent Agreement." For this reason, you state that the DOE is subject to stipulated penalties under Section XVII of the Agreement. The DOE disputes your authority to assess stipulated penalties under the Agreement before it becomes effective. Moreover, the DOE disputes that any violation of the access provision of the Agreement has actually occurred.

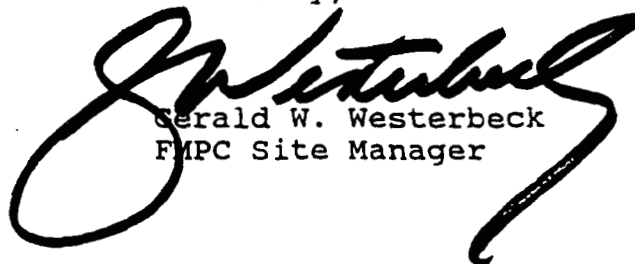
Contrary to your letter, the DOE is following the procedures in Section XXVIII to obtain access to private property where necessary to gather information under Section 104 of CERCLA, 42 U. S. C. § 9604. The DOE began implementing those procedures before the June 29, 1990 effective date of the Agreement by issuing three (3) notice letters under Section 104(e) of CERCLA, 42 U. S. C. § 9604(e). These letters were seeking access to private properties to install wells to obtain additional data for the remedial

investigation. In two cases, the property owners voluntarily consented to access. DOE is presently negotiating with representatives of the third property owner for access. These discussions have been complicated by an outdated access proposal between our contractor and the property owner. We expect to conclude these negotiations or refer the matter to the Department of Justice for further action in the near future.

Notwithstanding the DOE's efforts to obtain access, your letters of May 22, 1990 and June 20, 1990 object to the timeliness of DOE's efforts. The characterization of DOE's efforts as violative of the time frames contained in Section XXVIII of the Agreement for failure to refer outstanding access requests to the Department of Justice by May 30, 1990 is wrong. This deadline was selected by you based upon an earlier verbal assurance by DOE in the April 1990 Technical Information Exchange meeting of the time needed to issue the notice letters. When that assurance was made the DOE representative was not aware of complicating factors remaining from earlier negotiations between our contractor and the private property owner. However, neither the DOE's verbal assurance nor your May 30, 1990 deadline constitute a "term or condition of the Agreement" within the meaning of the stipulated penalty provision of the Agreement. In any event, the DOE agreed to exercise its CERCLA authorities when access is required "to assure timely performance" of its obligations under the Agreement. In the above instances, the DOE exercised its access authorities before the effective date of the Agreement. Any delays that have occurred (or any failures to meet informally established schedules) have not affected DOE's timely performance of obligations under the Agreement. Delays in meeting informal deadlines do not constitute violations of the Agreement and cannot trigger stipulated penalty assessments under the Agreement before its effective date.

The DOE has used and will continue to use its best efforts to obtain access to private property where needed for information-gathering purposes and to comply with the recently-effective Agreement. For your information, I am providing a copy of a letter from the Ruetgers-Nease Chemical Company, Inc. consenting to access for purposes of sampling and well installation. The Century-Farms, Inc. remains the only property owner who has not yet voluntarily consented to access. We will keep you apprised of our progress.

Sincerely,



Gerald W. Westerbeck
FMP Site Manager

DP-84:Osheim

Enclosure

cc w/encl.:

M. Walsh, OEPA-Columbus
G. E. Mitchell, OEPA-Dayton
P. Q. Andrews, USEPA-5
R. Ullrich, USEPA-5
D. A. Kee, USEPA-5
E. Schussler, PRC

bcc w/o encl.:

J. La Grone, M-1, ORO
W. R. Bibb, DP-80, ORO
C. S. Przybylek, CC-10, ORO